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No. 85-678

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED PACIFIC INSURANCE CO.
and ORLANDO-ANASTASI JOINT VENTURE,
Petitioners,

v.

ANIERO CONCRETE CO., INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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I. Introduction.

The Superior Court of New Jersey, Appellate Division ("Appellate Division") in its judgment and opinion entered May 6, 1985 (1a-5a)[1] held that on entering the federal Witness Protection Program ("Witness Protection Program")[2] an individual was relieved "of all claims,

1. Citations are to the Appendix accompanying the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

2. The federal Witness Protection Program was created pursuant to the Organized Crime Control Act of 1970, Pub.L. No. 91-452,

charges and responsibilities to which he may be subject" (2a) and that after entering the program that individual was "free of any adverse consequences from his words *because of* his entry into the government's witness protection program." (4a). (emphasis added). Based upon that holding, the Appellate Division determined that an individual enrolled in the Witness Protection Program had neither penal risk nor pecuniary liability for pre-enrollment conduct. The Appellate Division then concluded, based on those two precedent steps, that statements made by an individual enrolled in the Witness Protection Program were not, and apparently could not be, declarations against interest and that therefore such statements were inadmissible despite a New Jersey Rule of Evidence permitting the admission of declarations against interest. N.J.R.Evid. 63(10). (59a).

The petitioners, United Pacific Insurance Co. ("United Pacific") and Orlando-Anastasi Joint Venture ("Joint Venture") have described in detail why the principal holding of the Appellate Division is wrong and how, if uncorrected, it could damage important federal interests. Respondent Aniero Concrete Co., Inc. ("Aniero Concrete") has filed a Response in Opposition to the Petition. Aniero Concrete advances three reasons why the Petition should not be granted. Each of these three reasons will be discussed below. Each is without merit. None of the three upsets the bases on which the Petition rests. The Appellate Division is wrong in its interpretation of an important federal program. If not corrected the opinion endangers that program.

NOTES *(Continued)*

§§501-04, 84 Stat. 922 (1970) *repealed by* Witness Security Reform Act of 1984 (12a-13a) and the Witness Security Reform Act of 1984, 18 U.S.C. §§3521-28, Pub.L. No. 98-473, 98 Stat. 2153.

II. The Arguments Advanced By Aniero Concrete Are Without Merit.

A. The Question Presented To This Honorable Court Was Presented To, And Decided By, The Appellate Division.

The consequences of an individual's entry into the Witness Protection Program was the central question addressed in the Petition for Writ of Certiorari.

The Appellate Division in its May 6, 1985 judgment and opinion unambiguously, albeit incorrectly, decided that question. The Appellate Division held that a consequence of an individual's entry into the Witness Protection Program was that the enrolled individual was relieved of all liability and penal risk for pre-enrollment conduct. The Appellate Division held:

> In return for his testimony, the government altered Orlandini's identity, thus in effect relieving him of all claims, charges and responsibilities to which he may be subject as Rudolph Orlandini.

(2a).

* * *

> They do not qualify as declarations against interest because they were made when Orlandini knew that as a practical matter he would be free of any adverse consequences from his words because of his entry into the government's witness-protection program. *R.* 63(10).

(4a).

The assertion by Aniero Concrete in its opposition to the Petition for Writ of Certiorari that the question presented to this honorable Court was not decided by the Appellate Division is without merit.

The assertion by Aniero Concrete that the question was not presented to the Appellate Division is equally

without merit. The Appellate Division decided the question. It was a necessary predicate for its conclusion. The question was presented.

During the trial, an interlocutory appeal on the admissibility of certain statements was taken by Aniero Concrete to the Appellate Division. The interlocutory decision of the Appellate Division reversing the trial court was based on a faulty understanding of the Witness Protection Program. (7a-8a). With this prior history, the post-trial appeal to the Appellate Division naturally included presentation of the question of the consequences of an individual's entry into the Witness Protection Program. Indeed the very portion of the Brief to the Appellate Division submitted by petitioners United Pacific and the Joint Venture quoted by Aniero Concrete reflects that the question was presented. The Appellate Division was asked to consider the "scope of immunity, if any, from civil and criminal prosecution granted Orlandini in the Witness Protection Program." (R5a).[3] United Pacific and the Joint Venture urged the Appellate Division to consider the consequences of entry into the Witness Protection Program based on the evidence presented at trial (of which there was none) and on any other basis provided to it. The Appellate Division did consider the scope of immunity. It did consider the consequences of an individual's entry into the Witness Protection Program. Its consideration resulted in its decision. As has been set forth earlier, that decision was wrong.

Moreover, the question was raised by United Pacific and the Joint Venture in their Petition for Certification of Appeal from Final Judgment of the Appellate Division, filed with the Supreme Court of New Jersey on June 28, 1985.[4] Section II.A(1) of that Petition is entitled:

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3. Citations designated (R a) are to the Supplemental Appendix filed on behalf of Aniero Concrete.

4. The Petition for Certification of Appeal from Final Judgment of the Appellate Division was denied without opinion on July 23, 1985. (6a).

The Appellate Division erred in deciding, without any evidence in the record but rather on the basis of the personal understanding of the individual judges, that because Orlandini was enrolled in the Program, he had no liability for his statements and that therefore the statements were not admissible under Evid.R. 63(10).

The contention of Aniero Concrete that the question presented by petitioner was not raised in or decided by the Appellate Division is without merit.

B. The Appellate Division's Decision Is Not Based On State Law But Was Dictated By Its Erroneous Interpretation Of The Federal Witness Protection Program.

The Appellate Division held that the statements sought to be admitted as declarations against interest pursuant to N.J.R.Evid. 63(10) (59a) could not be admitted. That decision was not based on any interpretation by the Appellate Division of N.J.R.Evid. 63(10). It was based on the Appellate Division's erroneous conclusion that an individual's entry into the federal Witness Protection Program relieved that individual of liability to penal sanctions and for pecuniary judgments. The decision of the Appellate Division was based on its interpretation of a federal program, its interpretation of federal statutes. That misinterpretation of a federal program and a federal statute was the key to its decision.[5]

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5. Had the Appellate Division correctly interpreted the Witness Protection Program it would have concluded that an individual enrolled in the program remained liable to penal sanctions and for civil liability for pre-enrollment actions. It then would have understood that an enrolled individual had interests. Having interests, the individual could indeed make declarations against interest and those declarations would be properly admissible.

The decision of the Appellate Division, based on its incorrect interpretation of a federal statute is properly before this honorable Court. In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.* ____U.S. ____, 104 S.Ct. 2267 (1984) this honorable Court stated:

> It is equally well established, however, that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. . . .
>
> In others, in contrast, the state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority. . . . In both categories of cases, this Court has reviewed the federal question on which the state law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

____U.S. at ____, 104 S.Ct. at 2276-77. (citations omitted). *Accord, Michigan v. Long*, 463 U.S. 1032 (1983); *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942).

The contention of Aniero Concrete that this honorable Court should not review the decision of Appellate Division because it involves a state evidence rule is unsupported.

C. The Decision Of The Appellate Court Is Not Unimportant And, If Left Uncorrected, Would Have A Significant Detrimental Effect On The Witness Protection Program.

Aniero Concrete contends that the Petition for Writ of Certiorari should not be granted because the decision is "patently routine." That is incorrect.

As United Pacific and the Joint Venture have explained above, the decision is based on an incorrect interpretation of an important federal program. It is not a routine state evidentiary question.

United Pacific and the Joint Venture, in their Petition for Writ of Certiorari, set forth in detail the pernicious effects that the Appellate Division's decision could have on the Witness Protection Program. Aniero Concrete has not addressed those concerns. Rather, it has contended that this case is somehow limited to its facts. That contention is wrong. The Appellate Division held, as a necessary basis of its conclusion, that any individual's entry into the federal Witness Protection Program relieved that individual from liability.

Although the Appellate Division decision is not reported, it is not routine. It is wrong. It is important. It should be reviewed by this honorable Court.

III. Conclusion.

For all of the reasons set forth in this Brief and in the Petition for Writ of Certiorari, a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division should issue.

Respectfully submitted,

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Dated: December 3, 1985